

No. 49280-6-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

ZACKARY COURTOIS,

Appellant,

v.

**STATE OF WASHINGTON
DEPARTMENT OF SOCIAL AND
HEALTH SERVICES,**

Respondent.

APPELLANT'S REPLY BRIEF

**NORTHWEST JUSTICE PROJECT
TODD CARLISLE, Staff Attorney
WSBA #25208
Northwest Justice Project
715 Tacoma Avenue South
Tacoma, WA 98402
Phone (253) 272-7879, Ext. 0940
Fax (253) 272-8226
toddc@nwjustice.org**

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I. INTRODUCTION

Appellant Zackary Courtois has appealed the trial court's denial of an attorney's fees award under the state Equal Access to Justice Act (EAJA), RCW 4.84.340, *et. seq.* Although Mr. Courtois' prevailed before the trial court, the court denied his motion for an EAJA fee award because it determined that the agency's final orders in his case, while legally incorrect and factually unsupported, were nevertheless "substantially justified." Mr. Courtois seeks an order from this court that the trial court's denial of the EAJA fee award in his case constituted an abuse of discretion.

In its briefing to the Court of Appeals, the Respondent argues essentially that the trial court had complete discretion under the EAJA to conclude that the agency's final orders in Mr. Courtois' case were substantially justified, even in this case, where the agency's orders were reversed by the same trial court because they contained legal conclusions that violated the plain language of the agency's own eligibility rules, and contained fact finding that was not supported by evidence on which a reasonable person would rely.

The Court of Appeals should reject the Respondent's broad claim that the trial court had complete discretion to deny the EAJA fee award in this case. The legal standard by which an agency action is judged for

purposes of an EAJA fee award is comparable to the standards for reversal of an agency action in Washington's Administrative Procedures Act (APA), RCW Chapter 34.05, that the trial court determined were met in Mr. Courtois' case. The trial court's failure to recognize and consider the connection between the standards in the APA by which it reversed the agency's fact finding and conclusions of law in this case, and the standard in the EAJA that must be met for an agency action to be "substantially justified," constituted an abuse of discretion.

II. ARGUMENT

1. **The trial court's failure to recognize the connection between the APA standards by which it reversed the final agency orders in this case, and the EAJA standard by which it denied the attorney's fees motion, constituted an abuse of discretion.**

The trial court's denial of a motion for an award of attorney's fees under the EAJA is reviewed on appeal for an abuse of discretion. An abuse of discretion is established where the trial court applied an incorrect legal standard, or where the facts do not meet the requirements of the correct standard, or where the trial court's decision was outside the range of acceptable choices given the facts and the legal standard. *Respondent's Brief at 7; State v. Rundquist*, 79 Wn. App. 786, 793, 905 P.2d 922 (Div. II, 1995) *review denied*, 129 Wn.2d 1003, 914 P.2d 66 (1996)(citing

Washington State Bar Ass'n, Washington Appellate Practice Deskbook § 18.5 (2d ed.1993)

In the present case, the trial court's decision to deny attorney's fees under EAJA ignored the necessary elements of its own determination on the merits that the agency's final orders that were the subject of these judicial review proceedings contained fact finding and legal conclusions that met the standard for reversal by the court under the APA. The trial court's denial of attorney's fees under the EAJA without considering its own fact findings and legal conclusions on the merits constituted an abuse of discretion.

2. **An agency's conclusions of law that are determined by the court to violate the plain language of the agency's own eligibility rules cannot also be "substantially justified" under the EAJA**

In support of its claim that the trial court correctly determined that the conclusions of law in its final orders in Mr. Courtois' case were "substantially justified," the Department's brief extensively recites the legal arguments it made to the trial court regarding its interpretation of the DDA dual diagnosis rules applied in Mr. Courtois' case. *See Respondent's Brief* at 11-13. The Department ultimately asserts that its interpretation of its dual diagnosis rules in Mr. Courtois' case was

substantially justified because “a plain reading of the entire regulation supports the DDA’s interpretation.” Respondent’s Brief at 13.

The trial Court, however, reached the opposite conclusion regarding the plain reading of the rules in question. The trial court specifically determined that the Department’s claimed interpretation and application of its dual diagnosis rules in Mr. Courtois’ case constituted a reversible error of law under the APA because:

By their plain terms [DDA’s dual diagnosis rules] apply only if an applicant is currently dually diagnosed with a qualifying developmental disability and a separate mental illness, or other psychiatric condition.

CP 624 (Final Order at COL 2.4)(emphasis added).

If the Department’s legal conclusions regarding the interpretation and application of its dual diagnosis rules had been at all reasonable in light of the plain language of rules themselves, the trial court conducting review would have been obliged to defer to the Department’s interpretation. *See Auer v. Robbins*, 519 U.S. 452, 461, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997)(commenting that an agency’s interpretation of its own regulation is “controlling” on judicial review unless it is “plainly erroneous or inconsistent with the regulation.”).

In the present case, neither the trial court’s written order denying attorney’s fees, nor the Department’s briefing to this court explain how the

agency's conclusions of law that were rejected by the trial court because they violated the plain language of Department's own eligibility rules nevertheless were found to have a "reasonable basis in law" for purposes of the EAJA.

Although Washington courts have held that an agency's error of law that is reversible under the APA may still be "substantially justified" for purposes of the EAJA, *see e.g., Silverstreak, Inc. v. Washington State Dep't of Labor & Indus.*, 159 Wn.2d 868, 892, 154 P.3d 891, 904 (2007); *See Dep't of Labor & Indus. v. Lyons Enterprises, Inc.*, 186 Wn.App. 518, 542, 347 P.3d 464, (Div. II, 2016), none of the factors discussed by the courts in those cases as warranting denial of an EAJA fee award, such as unsettled case law, or an ambiguous statutory directive, are present in this case, where the agency's legal conclusions simply violated the plain language of its own regulations.

Conclusions of law in an agency order that violates the plain language of the agency's own eligibility rules cannot have a "reasonable basis in law" for purposes of the EAJA. The trial court's determination in Mr. Courtois' case that the agency's conclusions of law that were determined to violate the plain language of its own eligibility rule were nevertheless "substantially justified" for purposes of the EAJA constituted an abuse of discretion.

3. **The “substantial evidence” standard in the APA by which the trial Court reversed the agency’s fact finding in Mr. Courtois’ case is identical to the “substantially justified” standard by which that same agency fact finding must be judged for purposes of an EAJA fee award.**

The trial court reversed the agency’s fact finding regarding the administration of the adaptive testing in Mr. Courtois’ case because it was “not supported by substantial evidence.” CP 625 (Final Order at COL 2.6). In its briefing to the Court of Appeals, the Department claims that the trial court still correctly concluded that that same agency fact-finding was “substantially justified” for purposes of the EAJA. *Respondent’s Brief* at 9.

The Department’s briefing neither discusses the extremely deferential legal standard in the APA by which an agency’s fact finding may be reversed on judicial review, nor compares that standard with the “substantially justified” standard by which the same agency fact finding is to be reviewed for purposes of an EAJA fee award. The Respondent simply states broadly, and without any legal citation or analysis, that “the argument that the standards of the APA and the EAJA are equivalent conflicts with both the plain language of the statute and the case law interpreting it.” *Id.* A brief analysis of the case law interpreting the two standards establishes that they are, indeed, equivalent.

In order to establish that its final orders were “substantially justified,” and thereby avoid an award of attorney’s fees under the EAJA, the agency must show that its orders had “a reasonable basis in law and fact.” *Silverstreak, Inc.*, 159 Wn.2d at 892 (*quoting Cobra Roofing Serv., Inc. v. Dep’t of Labor & Indus.*, 122 Wn.App. 402, 420, 97 P.3d 17 (Div. III, 2004)). The agency had “a reasonable basis in law and fact” when its findings are “justified in substance or in the main,” and therefore “*justified to a degree that could satisfy a reasonable person.*” *Id.* (emphasis added) (*quoting Alpine Lakes Prot. Soc’y v. Dep’t of Natural Res.*, 102 Wn.App. 1, 19, 979 P.2d 929 (Div. I, 1999)).

Similarly, under the APA, the Court may reverse findings of fact contained in an agency’s adjudicative order only if it determines that the agency’s fact finding is not supported by “evidence that is substantial in view of the record as a whole.” RCW 34.05.570(3)(e). To be “substantial,” the evidence in the record in support of the agency’s fact finding must be of “*sufficient quantity to persuade a fair minded person*” that the agency’s factual determinations are true and correct. *See Cooper Point Ass’n v. Thurston Co.*, 108 Wn.App. 429, 443 note 19, 31 P.2d. 28 (Div. II, 2001)(emphasis added).

The EAJA and APA standards are the same. An agency’s fact finding cannot be insufficient to persuade a “fair minded person,” for

purposes of the APA analysis, yet still be sufficient to “satisfy a reasonable person” for purposes of the EAJA. *See e.g., Thangaraja v. Gonzales*, 428 F.3d 870, 874 (9th Cir. 2005) (commenting that it would be a “decidedly unusual case in which there is substantial justification under the EAJA even though the agency's decision was reversed as lacking in reasonable, substantial and probative evidence in the record.” (*quoting Al-Harbi v. I.N.S.*, 284 F.3d 1080, 1085 (9th Cir. 2002))).

In Mr. Courtois’ case, the trial court’s final order reversed the agency’s fact finding regarding the disputed adaptive function testing specifically because:

the review judge’s determination that the qualifying adaptive function testing in this case was not properly “administered and scored” is not supported by substantial evidence in view of the record as a whole.

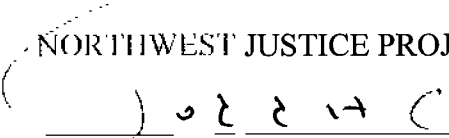
CP 625 (Final Order at COL 2.6). That finding could only have been made by the court based on a determination that the agency review judge’s fact finding was not supported by facts that a reasonable fair minded person would rely on. By failing to recognize that this same standard must apply in analyzing whether the agency’s factual claims had “a reasonable basis in fact,” and were therefore “substantially justified” under the EAJA, the trial court committed an abuse of discretion.

III. CONCLUSION

The trial court's denial of the EAJA fee award because the agency's final orders in Mr. Courtois' case "had a reasonable basis in law and fact," and were therefore "substantially justified" is contradicted by the court's own findings and conclusions on judicial review that resulted in the reversal of those same agency orders. A state agency's adjudicative order cannot both violate the plain language of its own eligibility rules, and be unsupported by substantial evidence, and yet still be "substantially justified" under Washington's EAJA.

The Court of Appeals should reverse the trial court's denial of Mr. Courtois' motion for attorney's fees and costs under the EAJA. This case should be remanded with instructions to the trial court to enter an order awarding Mr. Courtois attorney's fees, both for the proceedings in Superior Court, and for this appeal.

RESPECTFULLY SUBMITTED this 20th day of January, 2017.

NORTHWEST JUSTICE PROJECT

TODD CARLISLE, WSBA #25208
Attorney for Appellant, Zackary Courtois
Northwest Justice Project
715 Tacoma Avenue South
Tacoma, Washington 98402
Tel. (253) 272-7879 ext. 0940
Fax (253) 272-8226
Email toddc@nwjustice.org

CERTIFICATE OF SERVICE

I certify that today, the 20th day of January, 2017, a true and accurate copy of the foregoing **Appellant's Reply Brief** in the above-entitled matter was sent by both first-class mail and e-mail to the attorneys for Respondent in this matter:

Seth Dickey and William McGinty, Assistant Attorneys General
Attorney General of Washington
PO Box 40124
7141 Cleanwater Ln SW
Olympia, WA 98504-0124
Email SethD@ATG.WA.GOV & WilliamM1@ATG.WA.GOV

DATED this 20th day of January, 2017. -



TODD H. CARLISLE, WSBA #25208
Attorneys for Appellant

NORTHWEST JUSTICE PROJECT

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sethd@atg.wa.gov

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